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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. REFUGIO TOCHIHUITL, Defendant and Appellant.	G042901 (Super. Ct. No. 08CF1266) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W. Michael Hayes, Judge. Affirmed.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Scott C. Taylor and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Refugio Tochihuitl guilty of aggravated sexual assault of a child (Pen. Code, § 269, subd. (a)(3)) and nonforcible child molestation (Pen. Code, § 288, subd. (a)). The trial court sentenced him to a 15-year-to-life term on the aggravated sexual assault charge and stayed an eight-year term on the nonforcible child molestation charge.

Defendant's appeal raises two issues. He contends the trial court erred in refusing to permit further cross-examination of his victim relating to a subsequent molestation she suffered at the hands of another person. His second claim of error rests on the contention the prosecutor committed prejudicial misconduct during closing argument. We disagree with the first contention and find the alleged prosecutorial misconduct was cured by the court's comments to the jury. We therefore affirm the judgment.

FACTS

While his daughter B. (then five or six years old) was asleep, defendant removed her clothes and inserted his penis into her buttocks. Some five years later, B. reported the incident to a social worker. When interviewed by another social worker, B. stated that defendant had gotten on top of her; she tried to get him off by pulling him with her hands but was unable to do so because he was too heavy. When interviewed by the police, defendant admitted placing his penis into B.'s buttocks but denied that she had tried to push him away. At trial, B. testified she tried to push defendant away but he pushed her backwards unto the bed. Later she stated defendant used his hands to push her against the bed. The issue before the jury was whether the assault was accomplished "by use of force." During closing argument, defendant's counsel acknowledged his client's guilt of nonforcible child molestation but argued that proof was insufficient "to show beyond a reasonable doubt that there was force, duress, or violence used to

accomplish that inexcusable act." We recite additional facts as relevant to our discussion below.

DISCUSSION

1. The Limitation Placed on Cross-Examination was proper.

Some years after the molestation by defendant, B. was the victim of another molestation committed by one Roberto Vivas. Defendant alleged that, in connection with the investigation of that molestation, B. had made inconsistent statements about the amount of force used by Vivas. Defendant sought to introduce evidence about these allegedly inconsistent statements, contending that this evidence demonstrated B. was not credible in describing the amount of force used by defendant. The court conducted a hearing under Evidence Code section 402 concerning these alleged communications. During this hearing, Middleton, a therapist who had interviewed B., asserted the therapist-client privilege and the court ruled that Middleton's report would be inadmissible as hearsay.

Thereafter, defendant sought to cross-examine B. about these allegedly inconsistent statements. The prosecution moved to exclude this testimony under Evidence Code section 352, arguing that the later incident did not have sufficient probative value and would require undue consumption of time, confusion of the issues, and prejudice to the prosecution. The trial court granted the motion, stating it had "done the balancing required."

The trial court did not abuse its discretion in denying admission under section 352.

In the first place, examining the actual statements relating to the subsequent molestations, it is not obvious they are inconsistent. B. was reported to have told Officer Baek, "Vivas never actually touched her because she made up an excuse to get away and

on one occasion pushed his hand away from her when he attempted to touch her. Vival told her in Spanish, 'If you don't let me touch you, I'm going to violate you.'" A report prepared by Social Worker Watkins states, "Reporting party [later identified as therapist Middleton] states that [B.] disclosed that [Vivas] attempted to grab her [b]reast and put his hand down her pants. [¶] [Vivas] threatened to hurt family members if the child did not cooperate[;] however [B.] was able to fight him off." A report prepared by Social Worker Schofield states, "Reporting party [unidentified] states that [B.] disclosed that Vivas attempted to touch her chest and 'private area' over 20 times, but each time she was able to get away from him." Finally, a report prepared by Senior Social Worker McCluskey states, "[B.] stated [Vivas] tried to touch her vagina and breast between 10 and 30 times. That [B.] would always come up with an excuse to get away from him. [B.] reported that [Vivas] never managed to actually touch a private part. [Vivas] threatened once to 'violate' her if she did not let him touch her."

We fail to see significant inconsistencies, leave alone evidence of lying, in these statements. Statements that she "was able to fight him off," "pushed his hand away," and "was able to get away from him," would seem to describe the same or very similar conduct in the words of a child. And these statements are not inconsistent with the allegation that Vivas also threatened to hurt B.'s family members and to "violate" B. Attempts to characterize these statements as lies in cross-examining B. could certainly confuse the jury, a basis for excluding the evidence under Evidence Code section 352. And the lack of significant inconsistencies also demonstrates the lack of probative value of this evidence. Finally, evidence of a subsequent molestation of B. by another person does not bear on defendant's guilt and might mislead the jury to such a conclusion. Given the fact-specific nature of the inquiry under Evidence Code section 352, trial courts have broad discretion and are not subject to reversal unless the decision is arbitrary or capricious. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; *People v. Branch*

(2001) 91 Cal.App.4th 274, 282.) The trial court did not abuse its discretion in excluding this evidence.

We also reject defendant's argument that his Sixth Amendment right to confrontation entitled him to cross-examine B. about the subsequence molestation. As the Attorney General points out, although a right to cross-examination is included in the right to confront witnesses, the trial court may impose reasonable limits on cross-examination and Evidence Code section 352 is not impaired by the Sixth Amendment. (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.) The ordinary rules of evidence do not interfere with defendant's constitutional right to present a defense. (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.)

2. Any prosecutorial misconduct was cured.

Defendant argues that two statements made by the prosecutor during closing argument constituted prejudicial misconduct and that this misconduct violated his rights under the United States Constitution. We agree that at least one of these statements constituted misconduct, but any error was cured by the court's instruction to the jury.

As noted, the issue for the jury was whether there was force, duress, or violence used to accomplish the molestation. During closing argument, the prosecutor stated, "Simply rolling an adult body on top of a child has been found to be sufficient force." And, shortly thereafter, he stated, "To draw reasonable inferences from the behavior and in referencing other types of cases, simply referring to what other courts have viewed as reasonable information, inferences under the circumstances." Defense counsel objected to both statements. The court overruled the objection to the first statement but sustained the objection to the second statement and told the jury to disregard it by stating, "Folks, we're going to have you disregard the last paragraph, and not to draw undue attention to it, I'm not going to reread it. [¶] But what you have to do here is you have to decide what the facts are and follow the law as I give it to you, and

I'm not implying in any way the people haven't correctly given you the law, they ever haven't. I'll get objections to that if appropriate."

The first statement ("simply rolling an adult body on top of a child has been found to be sufficient force") was, at best, ambiguous. Defendant argues that the jury must have inferred from it that other juries or other courts found there was sufficient force where an adult placed his body on top of a child. Although speculative, this would be a possible conclusion and the court should have sustained the objection and instructed the jury to disregard the statement. Had the court done so, it is doubtful the prosecutor would have made the second statement at all. It was clearly an objectionable statement and it is difficult to accept that the prosecutor could believe such a statement was permissible. The Attorney General argues that it was a proper statement of the law; but a statement in cases such as *In re Asencio* (2008) 166 Cal.App.4th 1195, 1205-1206 that "roll[ing] over onto" the victim is substantial evidence of force is not the equivalent of a statement that "rolling onto" a victim constitutes force as a matter of law. And if the prosecutor desired the jury be advised of a rule of law, he should have submitted an instruction on the point. If given, which should not have been done in this instance, the prosecutor could have argued the point.

Nevertheless, the court instructed the jury to disregard the statement and we must assume that the jury followed the court's instructions. (See *People v. Prieto* (2003) 30 Cal.4th 226, 260 ["an admonition would have cured any prejudice from the alleged misconduct"].) Again, we reject defendant's contention that this event, which viewed within the scope of the entire trial was a rather minor digression, rises to an error of constitutional magnitude. We can hardly conclude that this statement '"infect[ed] the trial with such '"unfairness as to make the resulting conviction a denial of due process."' [Citations.]"' (*People v. Parson* (2008) 44 Cal.4th 332, 359.)

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.